SUPREME COURT, U. S.

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No. 1167

IN THE SUPREME COURT OF THE UNITED STATES

WALLACE R. RUTHERFORD, *Appellant*

v.

STATE OF WASHINGTON, *Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

KENNETH A. MACDONALD,
15th Floor, Hoge Building,
Seattle, Washington 98104

JACK J. LOBDELL,
1002 Hoge Building
Seattle, Washington 98104
Attorneys for Appellant.

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Attorneys for Appellant.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. _____

WALLACE R. RUTHERFORD, *Appellant*

v.

STATE OF WASHINGTON, *Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Washington entered on November 2, 1965, affirming a conviction in the Superior Court for Pierce County, State of Washington, of the crime of fraud in the sale of securities (Revised Code of Washington 21.20.010) and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of the State of Washington is not yet officially reported; it appears unofficially at 166 Wash. Dec. 837; and is appended hereto as Appendix A. The Superior Court in Pierce

County for the State of Washington did not render an official or unofficial opinion.

JURISDICTION

The Washington State Supreme Court sustained the validity of Revised Code of Washington 5.45.020 (commonly known as the Uniform Business Records Act) against the contention that the application of the statute to permit the introduction of certain evidence violated the constitutional mandate in the Sixth Amendment to the United States Constitution as incorporated into the Fourteenth Amendment of the United States Constitution that an accused is entitled to have the right to confront the witnesses against him and to cross-examine such witnesses. The final decision of the Supreme Court of the State of Washington was entered on December 2, 1965, and notice of appeal was served on appellee and filed in the Supreme Court of the State of Washington on January 31, 1966. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *Dahnke-Walker Milling Company v. Bondurant,* 257 U.S. 282; *King Manufacturing Company v. The City of Augusta,* 277 U.S. 100.

QUESTION PRESENTED

Was the federal constitutional right of the appellant to confront the witnesses against him violated by the application made of the "Uniform Business Records

Act'' as enacted in the State of Washington under the particular facts of the case.

STATUTE INVOLVED

The statute involved in this case is Revised Code of Washington 5.45.020 set forth as Appendix B hereto.

STATEMENT

Appellant was charged with the fraudulent sale of securities under State of Washington law. It was charged that the corporation, whose stock was sold by appellant, had little or no assets and that its principal claimed asset, an allegedly new metal alloy, was in fact worthless. In order to demonstrate the alleged worthlessness of the metal alloy the State of Washington offered the testimony of an engineer who did testify that tests had been made on this metal at a government testing laboratory. This witness gave his conclusions as to the worthless properties of the alloy in question. His conclusions were contained in the records from the testing laboratory as prepared by him. Some of the tests, which formed the basis of this witness's conclusions, were also in the records of the testing laboratory but had been made by others and the witness who testified at the time of trial had no first-hand knowledge of some of the tests made by others and the source of his knowledge as to those other tests were what the records of the laboratory revealed. He was, over objection, allowed to testify to his conclusions based partly on his own testing research and he was also allowed to testify, over objection, as to what the records showed as to tests made by others and he was further

permitted to testify and give his conclusions based upon an assumption of accuracy as to the tests made by others.

At the time of admission of the evidence above described, the appellant's counsel objected that the admission of such evidence violated appellant's right to be confronted by the witnesses against him and to cross-examine such witnesses and that such right was secured to the appellant by the Fourteenth Amendment to the United States Constitution. (The State of Washington has a similar constitutional provision in Amendment 10 to the Washington State Constitution.) The appellant, however, specifically objected on both federal and state constitutional grounds although the provision involved is the same for all intents and purposes. The Trial Court permitted the evidence under the "Uniform Business Records Act" codified in Revised Code of Washington 5.45.020.

In addition to asserting such objection in the Trial Court at length and in detail the appellant asserted this grounds in his appeal brief to the Supreme Court of the State of Washington. Appellant asserted the objection at every opportunity afforded.

THE QUESTIONS ARE SUBSTANTIAL

A. The Nature of the Case and of the Ruling of the Court Was Such as to Bring This Case Within the Jurisdictional Provision Relied On.

By its decision the Supreme Court of the State of Washington has upheld an application of a state statute which was claimed to work a violation of appel-

lant's federal constitutional rights to be confronted by the witnesses against him and to cross-examine such witness or witnesses. The issue as to a conflict between this state statute and the constitutional right of confrontation is clearly presented.

B. Reasons Why the Questions Presented Are So Substantial as to Require Plenary Consideration.

In *Palmer v. Hoffman*, 318 U.S. 109, the Supreme Court ruled that the Federal Business Records Act did not constitute an overall justification for the admission of all business records into evidence. That case was a civil case and the evidence involved was a report made by a train engineer after a train wreck. It was shown that such a report was a matter of business routine when a train wreck had occurred but that the motivation behind requiring such a report was to assit the railroad in defending itself in any future litigation arising out of the accident. The Court held that the factor of potential litigation made the reliability of the report somewhat suspect and, therefore, refused its admission.

This decision is a civil decision and does not involve the federal constitutional issue. The importance of the case is to demonstrate that even in a civil case the United States Supreme Court has rejected evidence which technically may fall within the literal wording of the Business Records Act if it deems that some good judicial reason requires the rejection of such evidence.

The Federal Courts have indicated that a definite conflict exists between the Federal Business Records Act (now codified as 28 U.S. Code Section 1732) and

the federal constitutional right of confrontation in criminal cases. In the case of *McDaniel v. The United States,* 343 F. 2d 785 (1965), the Court ruled that the Trial Judge has a duty to see if a document sought to be admitted under the Federal Business Records Act violates the right of confrontation. In the case of *U.S. v. Johns-Manville Corporation* (D. C. Penn.) 231 F. Supp. 690, and *U.S. v. Johnson-Manville Corporation* (D. C. Penn.) 225 F. Supp. 61, the Court in deciding whether or not certain evidence was admissible in a criminal case under the Uniform Business Records Act stated that the Court could make no blanket or definitive ruling on the proferred evidence in general but would have to examine each piece of evidence to see if the violation of the federal confrontation right was a substantial violation or not. The Court in that circumstance indicated that government should, if at all possible, produce the witness rather than relying upon the Business Records Act.

In the case of *Massachusetts Bonding & Insurance Company v. The Norwich Pharmaceutical Company,* reported in 18 F. 2d 934 (2nd Cir. 1927), the Court ruled that by reliance upon the Business Records Act entries could be proved when the entries were of a routine or accounting nature and where the entries were routinely made and where they were voluminous and where there was a probability that the persons making the entries would not recall them even if called as a witness. The Court suggested that the routine nature of the entries suggested reliability and that there be a factor involved in the situation of expense in bringing the witnesses into court.

In short, the few decisions that are available on the subject suggest that a conflict exists between the federal constitutional right of confrontation and the statute permitting one witness to testify as to facts of which the witness has no knowledge. It is suggested by these decisions, both directly and as a matter of deduction, that the conflict exists but that no guide lines have been established by the United States Supreme Court for the resolution of the conflict.

The evidence admitted by the Washington State Court is clearly hearsay, is of a substantial nature, and its method of introduction prevented any confrontation or cross-examination of the witness.

The appellant is not aware of a definitive decision by the United States Supreme Court which would operate as a guide for the resolution of such conflicts in the future by the State or Federal District Courts.

It is submitted that the conflict is real and is in need of solution and that until a definitive decision is announced, which prescribes some kind of a legal formula for its solution, that an important area of the law remains undefined and the problems lurking within it remain unresolved.

Conclusion

It is submitted that this Court should consider the question presented by this appeal to be substantial and that the issue presented should be given plenary consideration.

Respectfully submitted,

KENNETH A. MACDONALD,
15th Floor, Hoge Building,
Seattle, Washington 98104

JACK J. LOBDELL,
1002 Hoge Building
Seattle, Washington 98104
Attorneys for Appellant.

APPENDIX A

DECISION OF THE WASHINGTON STATE SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, *Respondent*, vs. WALLACE R. RUTHERFORD, *Appellant*.	No. 36869 Department Two Filed Sept. 16, 1965

The appellant was charged by amended information on eight counts of fraud in the sale of securities, for which criminal penalties are prescribed in RCW 21.20.400, and was found guilty on four counts. He has appealed from the judgments and sentence entered on the verdict.

It is first contended that the trial court erred in permitting the chief of materials testing for the Air Force at Tinker Field, Oklahoma, to testify as to the results of tests performed on "Metal X," the substance about which the fraudulent representations were alleged to have been made. The evidence showed that these tests had been performed at the request of the appellant, who was endeavoring to interest the Air Force in his product and had suggested procedures to be followed in testing. Mr. Spellman, the chief of testing, was in charge of a group called the Materials Branch, which consisted of approximately forty people — engineers and scientists, chemists, physicists, metallurgists and technicians. There was a Physical Testing Section and

a Chemical Testing Section. Mr. Hopkins, who was in charge of the Physical Testing Section (under Mr. Spellman's supervision) had suffered a stroke and was unable to testify at the trial. Mr. Spellman was allowed to testify concerning reports made to him by Mr. Hopkins and others in the laboratory.

In testifying, Mr. Spellman referred to a report which he had made at the conclusion of the tests. This report was compiled from oral and written reports made to him by Mr. Hopkins and others who had participated in the testing procedures. The appellant's contention is that his testimony as to the results of the tests is hearsay, because he did not personally conduct the tests and could not be cross-examined on the procedures followed or testify of his own knowledge concerning what was done.

Under our Uniform Business Records Act, RCW 5.45.020, the report made by Mr. Spellman was admissible. That act provides:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

This act contemplates that such a record is presumptively reliable if it was made in the regular course of business and there was no apparent motive to falsify. Implicit in it is the presumption that an employee will

do his duty. It does not require that the record should have been made by the person actually doing the act, but only that it should have been made in the regular course of business, under circumstances which the court finds rendered it trustworthy. In commenting on the desirability of such a rule of evidence, Professor Wigmore says:

> No doubt much should be left to the discretion of the trial court; production [of witnesses] may be required for cross-examination, where the nature of the controversy seems to require it. But the important thing is to realize that upon principle there is no objection to regarding this situation as rendering in a given case the production of all the persons practically as impossible as in the case of death.
>
> (4) The conclusion is, then, that *where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter persons, there is no objection to receiving that entry under the present Exception* [*to the hearsay rule*], *verified by the testimony of the former person only, or of a superior who testifies to the regular course of business, provided the practical inconvenience of producing on the stand the numerous other persons thus concerned would in the particular case outweigh the probable utility of doing so.*

Why should not this conclusion be accepted by the Courts? Such entries are dealt with in that way in the most important undertakings of mercantile and industrial life. They are the ultimate basis of

> calculation, investment, and general confidence in every business enterprise. Nor does the practical impossibility of obtaining constantly and permanently the verification of every employee affect the trust that is given to such books. It would seem that expedients which the entire commercial world recognizes as safe could be sanctioned, and not discredited, by Courts of Justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the court-room. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scruples on the part of the same persons who as attorneys have already employed and relied upon the same methods. In short, Courts must here cease to be pedantic and endeavor to be practical. 5 Wigmore, Evidence, §1530 (3d ed. 1940).

And, by the same token, if the written record of the report should be admissible, as trustworthy evidence, why should not the person who made the record be permitted to testify to its contents? The appellant in this case has not given a single reason why the testimony should be considered untrustworthy and has ascribed to the witness no motive for falsification. In the light of all the other testimony on the subject, there can be little doubt that the facts were in accord with the evidence given by this witness.

The appellant cites the cases of *Seattle v. Bryan,* 53 Wn. 2d 321, 333 P. 2d 680; *State v. Chemeres,* 20 Wn. 2d 712, 147 P. 2d 815; and *State v. Baker,* 56 Wn. 2d

846, 355 P. 2d 806. None of these is in point and none supports the proposition advanced by the appellant. In the first, it was held that any error in permitting the arresting officer to testify as to the results of a Harger test which he did not administer was harmless, inasmuch as the result was established by other evidence. The officer was not in charge of the administering of Harger tests, and it was not a duty of the officer who administered the tests to report to him. *State v. Chemeres, supra,* is concerned with the rules pertaining to the admission of opinions of experts and does not discuss any aspect of the question presented here; and *State v. Barker, supra,* also discusses the competency of experts but not the question whether a witness may testify concerning reports made to him in the ordinary course of business.

We conclude that the trial court did not abuse its discretion in permitting the witness to give the results of tests performed under his supervision and control, even though he did not personally conduct the tests or witness their performance.

The appellant next contends that the court improperly permitted a mining engineer to testify for the state that he was unable to locate many of the mining claims asserted by the appellants through use of the appellant's descriptions in his claims. He cites *Olympia Manganese Mining Co. v. Downing,* 156 Wash. 686, 287 Pac. 872, which holds that unless rights of a third party intervene, defects in the manner and form of a location notice will not defeat a claim. This contention is without merit. The state was not attempting to defeat

any mining claim of the appellant, but to show that his representations to prospective purchasers of securities concerning the nature and extent of his claims were fraudulent. The testimony of the engineer was relevant as bearing on the question whether his asserted claims did in fact exist. There was extensive additional evidence presented by the state tending to show that his representations to prosepective purchasers grossly exaggerated the number and misrepresented the nature of his claims. For this reason, there is likewise no merit in the additional contention advanced by the appellant that the trial court should have instructed the jury that the state had failed to prove fraud in this regard.

Error is assigned to the refusal of the following instruction, requested by the appellant:

> The court has herein admitted certain evidence as to the issuance of the stop order, by the Division of Securities, Washington State Department of Licenses, on the sale of stock of the Metallo Sales and Manufacturing Company, Inc. In such regard, the jury is instructed that there is no authority under the law of the State of Washington for the issuance of such an order and the same, whether issued and served upon the defendant or not, was without legal force or effect and was not binding upon the defendant or the Metallo Sales and Manufacturing Company, Inc.

The allegations in the information with reference to this stop order were that the appellant did knowingly and feloneously conceal the material fact that such an order had been issued. There was no allegation that the order was valid or issued with statutory authority. Consequently, the validity of the order was not at issue

in this action. The fact that the order had been issued, whether or not the department had statutory authority to so issue it, was a material fact of interest to prospective purchasers of securities, who would at least be put on inquiry if advised of its existence; and it was the deception of the appellant in failing to disclose his knowledge of its issuance which was alleged to be fraudulent. Since its validity was not at issue and was not material, the rejection of the proposed instruction was not prejudicial error.

The appellant next urges that the trial court improperly instructed the jury that intent need not be proved by "direct and positive" evidence, but may be proved by circumstantial evidence. It is suggested that to instruct the jury that "positive" evidence is not necessary is to suggest that the state need not prove its charge beyond a reasonable doubt. But we do not think such a connotation is indicated. The word is used in the same sense as "direct." In Webster's New Twentieth Century Dictionary (2d ed. 1960), it is defined, *inter alia,* as follows:

> 1. explicitly laid down; express; direct, explicit, precise, specific; as, he told us in *positive* words, we have his *positive* declaration to the fact.
>
> ....
>
> 4. beyond all doubt, qualification or denial; undeniable; sure, incontestable; express; opposed to *circumstantial,* as *positive* proof."

This is the sense in which the word was used in the instruction and the sense in which it was calculated to be understood. The giving of the instruction was not error.

All the remaining assignments of error, except one, pertain to instructions given by the court which are not set out in the brief. Under Rule on Appeal 43, RCW vol. O, such assignments will not be considered. *Rank v. Alaska Steamship Co.*, 45 Wn. 2d 337, 274 P. 2d 583.

The final contention of the appellant is that the trial court committed prejudicial error in permitting the jury to deliberate some 72 hours after a trial lasting approximately 23 days. No authority is cited in support of this proposition. The supreme court will not consider an assignment of error not supported by citation of authority unless it appears on its face that the assignment is well taken. *Harvey v. Clemans*, 65 W.D. 2d 828, 400 P. 2d 87; *Frey v. Kent City Nursing Home, Inc.*, 62 Wn. 2d 953, 385 P. 2d 323. The assignment made here does not have this attribute.

The judgment is affirmed.

ROSELLINI, C. J.

We concur:

HILL, J.

WEAVER, J.

HAMILTON, J.

KELLY, J. Pro Tem

APPENDIX B

REVISED CODE OF WASHINGTON 5.45.020

"A record of an act, condition or event, shall insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the Court, the sources of information, method and time of preparation, were such as to justify its admission."

END